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IN THE

Supreme Court of the United States

AMERICAN CHIROPRACTIC ASSOCATION, INCORPORATED, a non-profit corporation, *et al.*,

Petitioners,

v.

TRIGON HEALTHCARE, INCORPORATED, *et al.*,

Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Fourth Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF CHIROPRACTIC COLLEGES IN SUPPORT OF PETITIONERS

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STATEMENT ON SUBMISSION

This Amicus Curiae Brief[1] is submitted on behalf of Petitioners with the consent of all of the parties.

INTEREST OF THE ASSOCIATION OF CHIROPRACTIC COLLEGES

If the decision of the United States Court of Appeals for the Fourth Circuit in American Chiropractic Ass'n, Inc. v. Trigon Healthcare, Inc., 367 F.3d 212 (4th Cir. 2004), is allowed to stand, member institutions of the Association of Chiropractic Colleges ("ACC") will be adversely affected in two ways. First, the number of men and women seeking admission to ACC institutions will diminish. Second, the default rate on the repayment of student loans will increase. These events will occur because the Trigon decision will result in diminished income to chiropractors, thereby making entrance into the profession less attractive and reducing the ability of recent graduates to earn the level of income necessary to repay federally insured student loans.

After completing prerequisite undergraduate collegiate courses, a student is eligible, if accepted, to enter a chiropractic college, which culminates in a first professional degree as a doctor of chiropractic. The ACC represents 16 U.S. institutions with a current enrollment of approximately 10,000 students. Graduates of ACC's accredited programs have completed four years of study in a clinical doctorate program.

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[1] Counsel of Record for the amicus curiae wrote this amicus curiae brief in its entirety. Counsel for other parties did not author any part of this brief. No person other that the amicus curiae made any monetary contribution to the preparation and submission of this brief.

While tuition costs vary among chiropractic institutions, an applicant for admission can expect to pay approximately $120,000-$130,000 to achieve his or her doctor of chiropractic degree. 90% of chiropractic students graduate with loans which average $100,000-$125,000. These loans are provided by lending institutions working with the academic institutions and are federally insured.

An increased default rate on these student loans will not only impact the federal budget but defaults above a certain level will also cause U.S. Department of Education officials to restrict or suspend an institution's eligibility to participate in the federal student loan guarantee program. Given the heavy dependence of chiropractic students on federally guaranteed loans to finance their education, this result would have a devastating effect on ACC's member institutions.

In addition, the primary lending institution to chiropractic students currently provides research scholarships to the institutions and loan recipients receive a very advantageous loan rate. Both of these positive aspects of the existing loan program would be jeopardized by an increased loan default rate.

Upon graduation, doctors of chiropractic expect to earn an adequate income allowing them to operate their businesses and, if necessary, to repay any outstanding loans from fees for service. Studies document that the inability to earn that expected income, and the additional burden of student loans, will decrease the number of undergraduate students seeking to become doctors of chiropractic, thereby reducing college enrollment and directly harming ACC member institutions.

ACC's member institutions are almost 100% dependent on tuition. Therefore, changes in enrollment have an immediate impact on the ability of the institutions to pay for the costs associated with providing an educational program, including faculty, research, and student services. Thus, economic forces which impact the decision of undergraduates to pursue a doctor of chiropractic degree are of enormous import to ACC, its members, and its students.

SUMMARY OF ARGUMENT

The Trigon decision improperly extends the intracorporate immunity doctrine by allowing two economically separate entities to conspire in a manner which would otherwise be in violation of the Sherman Act. Under Trigon, one entity can now create a committee comprised of representatives of the other entity and that committee can lawfully create or validate an otherwise proscribed anti-competitive policy.

ARGUMENT

A. Actions By Trigon Healthcare, Inc. Will Harm ACC And Its Member Institutions.

As noted above, the actions taken by Trigon Healthcare, Inc. ("Trigon"), upheld by the United States Court of Appeals for the Fourth Circuit, will harm ACC and its member institutions. The relevant facts which document Trigon's actions and intent are four.

First, recognize at the outset that Trigon is not in the business of evaluating the relative quality of healthcare provided. Instead, Trigon sells health insurance and has become Virginia's largest for-profit health insurance company. Appellants Opening Brief at 20, American

Chiropractic Ass'n. v. Trigon Healthcare, Inc., 367 F.3d 212 (4th Cir. 2004) (No. 03-1675), ("Appellants Brief"). Indeed, Trigon admits it does not make value judgments that one treatment is more efficacious than another. Appellees Brief at 5, American Chiropractic Ass'n v. Trigon Healthcare, Inc., 367 F.3d 212 (4th Cir. 2004) (No. 03-1675). Thus, it would be outside the proper scope of Trigon's legitimate business interest to pronounce judgments about what method of treatment is most appropriate for a certain medical condition.

Second, in 1994, the Agency for Health Care Policy and Research ("AHCPR"), an agency of the U.S. Department of Health and Human Services, did make a pronouncement about the most effective treatment for back pain. In a 170 page study titled "Acute Low Back Pain in Adults," AHCPR concluded that spinal manipulation was the most efficacious method of treating lower back pain. Appellants Brief at 21-22. Spinal manipulation therapy is a treatment provided by doctors of chiropractic. Trigon, 367 F.3d at 221-222.[2] The study was completed by a multi-disciplinary panel which included twelve medical physician experts. Appellants Brief at 21. During the two year study, abstracts of over 10,000 research papers were reviewed and almost 4,000 articles were specifically examined. Id. The professional journal of the American College of Physicians and the American Society of Internal Medicine stated that the AHCPR study "concluded that spinal manipulation therapy is the most effective and cost-effective treatment for acute lower back pain . . . ." Trigon, 367 F.3d at 221-222.

Third, even though Trigon admits it has no business interest in recommending one medical treatment over another, Trigon adopted a "referral" guideline governing to

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[2] Doctors of chiropractic have the most education and training in the assessment and treatment of spinal conditions.

whom medical doctors should refer lower back pain patients for treatment. Trigon claims its referral guideline was only a simplified restatement of the AHCPR report. However, in stark contrast to the AHCPR report which concluded that spinal manipulation was the most effective and cost effective treatment for back pain, Trigon's referral standard stated only that such treatment "may be as effective" as other forms of treatment. Trigon, 367 F.3d at 222.[3] Thus, despite admissions that Trigon was not in the business of evaluating the relative merits of competing treatment methodologies, Trigon did precisely that. Indeed, Trigon's guideline was considered to be "an informative practice guideline for physicians." Trigon, 367 F.3d at 221. Trigon then distributed its referral guideline to its participating medical doctors, (almost 90% of the medical doctors in Virginia). Appellants Brief at 10 and 38.

Fourth, there is enormous economic significance associated with the health care professional to whom a lower back patient is referred. Back pain is the second leading cause of visits to medical physicians. Id. at 24. Approximately 37% of all chiropractic patients seek treatment for back pain and a significant percentage of these patients seek an appointment with a doctor of chiropractic because they have been referred by a medical physician. Thus, when Trigon issued its pronouncement to its member doctors about how Trigon expected them to conduct their practice, there was little doubt it would have a significant impact on who earns fees for treating patients with back pain. In fact, unhindered referrals of patients by medical doctors would have resulted in the transfer of an estimated $60 million from medical physicians in Virginia to doctors of chiropractic. Appellants Brief at 25.

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[3] Trigon's referral guideline was not based on any independent analysis but was based exclusively on the AHCPR report. Appellants Brief at 38.

In summary, an entity supposedly without any interest in the selection of medical treatment did, in fact, prepare a treatment referral policy which deliberately misstated the consensus national study and which advantaged one group of providers, medical doctors, over another group, doctors of chiropractic. The effect of Trigon's policy was to inflict economic harm on doctors of chiropractic.[4]

Compounding the problem is the fact that Trigon's policy is to pay chiropractors 40% less than medical doctors are paid for the exact same diagnostic and treatment services, notwithstanding the consensus conclusions of the AHCPR study and notwithstanding the fact that doctors of chiropractic are a recognized branch of the healing arts. Trigon, 367 F.3d at 218; Appellants Brief at 23. Doctors of chiropractic are the only group of physicians to whom Trigon applies this reduction in payments. Thus, in competing for patients, doctors of chiropractic not only confront Trigon's referral policy, but they must also either reduce their income by reducing fees to the amount Trigon will pay, or expect patients who select chiropractic treatment to pay more out of their pocket. Either scenario has a negative impact on the fees doctors of chiropractic can expect to earn.

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[4] Trigon is the successor to Virginia Blue Cross and Blue Shield. Appellants Brief at 13. In 1962, the American Medical Association ("AMA") "aided by the National Association of Blue Shield Plans, began a 'lengthy, systematic, successful, and unlawful' national group boycott aimed at destroying chiropractic medicine." Trigon, 367 F.3d at 219, quoting Wilk v. Am. Medical Ass'n., 895 F.2d 352, 371 (7th Cir. 1990). In another context the United States Court of Appeals for the Fourth Circuit condemned Virginia Blue Cross and Blue Shield for anti-competitive conduct in attempting to adopt policies favoring one group of caregivers over another. Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia, 624 F.2d 476 (4th Cir. 1980).

Simply put, Trigon decided to pay less for the treatment the AHCPR study found to be the most effective. In other words, Trigon decided to increase its operating costs by paying more for less effective treatment. This is illogical business behavior. Trigon's action, particularly when coupled with Trigon's deliberate misrepresentation of the AHCPR study, is indicative of an intent to disadvantage doctors of chiropractic vis-à-vis medical doctors.

B. Trigon Conspired With Medical Doctors To Inflict Harm Upon Chiropractors, Including ACC And Its Member Institutions.

Trigon's actions described above were not taken unilaterally. Trigon effectively collaborated and conspired with medical doctors to harm doctors of chiropractic and, therefore, ACC and its member institutions. The facts, in addition to those stated above, are these.

First, although doctors of chiropractic are recognized by statute as a branch of the healing arts, there is a long and deep "history of animus from medical doctors and insurers aimed at chiropractors." Trigon, 367 F.3d at 218. The courts have found that medical doctors and insurers have engaged in a systematic and unlawful boycott aimed at destroying chiropractic medicine. Id. at 219. One court involved in the litigation surrounding those findings went so far as to issue an injunction to protect doctors of chiropractic. Wilk v. Am. Medical Ass'n., 671 F. Supp. 1465 (N.D. Ill. 1987), aff'd., 895 F.2d 352 (7th Cir. 1990), cert. denied, 496 U.S. 927 (1990). Given this legal history and injunction, it is not surprising that medical doctors and insurers take great effort to disguise their antipathy toward doctors of

chiropractic who are a direct competitor with medical doctors in providing services to patients suffering back pain.

Second, Trigon convened its Managed Care Advisory Panel ("MCAP") to review its back pain referral guidelines so that Trigon could claim its policy was endorsed by an independent panel of experts, which is precisely what Trigon did. However, the composition of the MCAP committee virtually guaranteed the result. MCAP had fifteen members, nine of whom were "independent medical doctors appointed by professional organizations" of medical doctors. Trigon, 367 F.3d at 221. Trigon itself characterized these nine medical doctors serving on MCAP as "representatives" of medical associations who had been "appointed by" these associations. Appellants Brief at 26. The medical doctors on MCAP represented associations whose members were in direct competition with doctors of chiropractic. No chiropractors served on MCAP.[5]

Third, although MCAP had no decision making authority within Trigon, it was a committee to which Trigon turned for independent review of Trigon policies. Thus, when Virginia's medical doctors received Trigon's back pain treatment and referral guidelines stating that chiropractic treatment "may be" as effective as other forms of treatment, they received the guidelines with Trigon's proud claim that the guidelines had been "approved and endorsed" by MCAP. Trigon, 367 F.3d at 222. Trigon treated MCAP as an independent review panel and effectively represented it as such.

In sum, Trigon materially altered the AHCPR findings and then gave the altered findings to a review board

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[5] Of Trigon's six employees serving on MCAP, four were medical doctors.

comprised of economic competitors of chiropractic medicine for review. Trigon then told its participating medical doctors, 90% of Virginia's medical doctors, that its referral guidelines had been independently reviewed and approved. While Trigon may have stated its referral guidelines were based on the AHCPR report, no one on the select MCAP, least of all the medical doctors serving as representatives of their medical associations, could have been unaware of the true findings of the AHCPR report. Thus, Trigon, working with MCAP, issued a false report which caused economic harm to doctors of chiropractic and to ACC and its member colleges.

C. The Legal Principle Adopted By the Appeals Court Is Incorrect.

If Trigon had acted in concert with an association of medical doctors to place chiropractors at a competitive disadvantage, the result would be the same as in Wilk v. Am. Medical Ass'n., 895 F.2d 352 (7th Cir. 1990), where the court found that a national association of medical doctors had conspired with health insurance companies to inflict economic harm on doctors of chiropractic. The question before this Court is whether the result should be any different simply because the health insurer, rather than working directly with an association of medical doctors, created a committee to which the association of medical doctors appointed its "representatives." The United States Court of Appeals for the Fourth Circuit held that such a procedural deception was sufficient to circumvent this nation's antitrust laws.

The Appeals Court found that the committee Trigon created was a Trigon committee and, under the intracorporate immunity doctrine, Trigon could not commit an antitrust violation because Trigon could not conspire with

itself. Contrary to the holding in Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984), this argument opens a gaping hole in our nation's antitrust laws.

When this Court announced the intracorporate immunity doctrine with respect to corporations and their wholly owned subsidiaries in Copperweld, this Court stated it was deciding the "narrow issue" of "whether a parent and its wholly owned subsidiary are capable of conspiring in violation of § 1 of the Sherman Act." Id. at 767. The Court's decision turned on the fact that all of the players in the alleged conspiracy were officers and employees of the same corporate entity. Id. at 769-771. The Court noted that it was irrelevant if a parent corporation operated through subsidiary companies because the parent could, at any time, assert control over the subsidiary. Id. at 771-772. In considering these issues, the Court cautioned against elevating form over substantive reality. Id. at 772.

The facts underpinning Copperweld are absent here. Here, there is no parent and no controlled subsidiary consisting of employees of the parent. Instead, there is a committee where majority control is vested in people who are considered by Trigon to be "representatives" of separate and independent entities. None of these representatives are officers or employees of Trigon. Indeed, when Trigon altered the national consensus AHCPR study to create its own referral guidelines, Trigon bragged that its referral guideline had been approved by this committee, effectively treating this committee as an independent entity. For the Fourth Circuit to find that Trigon's actions fall within the protection of Copperweld elevates form over substance.

If the ruling of the United States Court of Appeals for the Fourth Circuit prevails, it opens the door to independent economic entities avoiding the Sherman Act's prohibitions

by simply having one entity create a committee controlled by representatives of the other entity, and then having the first entity adopt the findings of the committee. Such a result vitiates Section 1 of the Sherman Act by extending Copperweld into the nether region of strained interpretations.

Allowing the Fourth Circuit's decision to stand also undermines this Court's ruling in Allied Tube and Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988). There, members of a private standard setting association met to adopt a standard for the economic benefit of certain members. Again, this Court chose to examine closely the "context and nature" of the activity and found the standard setting committee had improperly exercised market power because one group had "stacked" the Committee. Id. at 504-508. Importantly, the Court found that an association cannot validate its anti-competitive activities by claiming it has unbiased procedures when, in reality, its procedures allow economically interested parties to use the process to disadvantage competitors. Id. at 509.

In the instant case, Trigon created a committee, allowed competitors of doctors of chiropractic to stack the committee with its representatives, asked the committee to approve a biased and incorrect referral guideline, and then adopted the guideline as its own, proclaiming to all that the guideline had been approved by a review committee. The parallels to Allied Tube and Conduit are striking. Yet, the Appeals Court decision in Trigon reached a different result, effectively nullifying this Court's ruling in Allied Tube and Conduit, and providing a clear pathway for persons to circumvent that decision.

CONCLUSION

This Court should grant the Petition for Certiorari to prevent its decisions in Copperweld and Allied Tube and Conduit from being overturned and to prevent Trigon and its allied medical doctors from collaborating to inflict economic harm on ACC and its students.

Respectfully submitted,

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